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No. 90-145

In the Supreme Court of the United States

OCTOBER TERM, 1990

JAMES J. LYONS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's Fourth Amendment rights were infringed when FBI agents inserted a key lawfully in their possession into a padlock securing a rented storage compartment used by petitioner to ascertain that the key fit the padlock.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-33) is reported at 898 F.2d 210.

JURISDICTION

The judgment of the court of appeals was entered on March 13, 1990. A petition for rehearing was denied on April 23, 1990. Pet. App. 34-35. The petition for a writ of certiorari was filed on July 20, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After trial to a judge in the District of Rhode Island, petitioner was found guilty of conspiracy to possess more than one kilogram of cocaine (Count 1), in violation of 21 U.S.C. 846; possession with intent to distribute cocaine (Count 2), in violation of 21 U.S.C. 841(a)(1); possession of unregistered firearms (Counts 3-6), in violation of 26 U.S.C. 5861(d); possession of a firearm without a serial number (Count 7), in violation of 26 U.S.C. 5861(i); and possession of a firearm by a previously convicted felon (Count 8), in violation of 18 U.S.C. App. 1202(a)(1) (1982). He was sentenced as follows: 20 years' imprisonment and a $250,000 fine on Count 1; a consecutive term of 20 years' imprisonment followed by 20 years' special parole on Count 2; concurrent terms of ten years' imprisonment on Counts 3-6, plus a $50,00 fine on each count; a concurrent term of ten years' imprisonment plus a $25,000 fine on Count 7; and a concurrent term of two years' imprisonment plus a $25,000 fine on Count 8.

1. Petitioner was lawfully arrested by FBI agents on April 2, 1986, pursuant to an arrest warrant issued on September 12, 1985, involving drug trafficking charges. A search of petitioner incident to his arrest yielded two padlock keys with no distinctive markings. Pet. App. 2.

On the day of petitioner's arrest, FBI agents went to the E-Z Mini Storage Company in Warwick, Rhode Island, which is in the business of renting storage spaces to individuals. The proprietor identified petitioner from a photograph as having been at

the Storage Company.[1] A consensual review of the Storage Company records revealed that storage compartment #633 had been rented in the name of Larry Gallo, whom the agents understood through informant information to be an associate of petitioner's and who was named as a co-defendant in petitioner's indictment. Pet. App. 3.

The agents inserted one of the keys they had previously taken from petitioner into the padlock securing compartment #633. The key unlocked the padlock. Without opening the compartment, the agents relocked the padlock to secure the storage compartment and left to apply for a search warrant. The compartment was opened pursuant to a warrant on April 3. Inside the compartment was a cache of cocaine and weapons on which petitioner's convictions were based. Pet. App. 3.

2. In the district court, petitioner moved to suppress the evidence taken from the storage compartment on the ground that the testing of the key in the padlock was an unlawful search. Petitioner argued that without the information that petitioner had access to the storage compartment, which was inferred from the matching of key and padlock, there was no probable cause to support issuance of the warrant. The district court denied the motion, ruling that the agents' testing of the key in the padlock did not constitute a search. Pet. App. 42.

3. The court of appeals affirmed petitioner's conviction.[2] The court ruled that the insertion of the

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[1] The record does not reveal why the agents suspected that petitioner might have used a storage compartment at that location. See Pet. App. 3 n.1.

[2] The court remanded for clarification of the record as to a sentencing issue not presented by the petition. See Pet. App. 16-17.

key into the padlock was not a "search" within the meaning of the Fourth Amendment. The court noted that "[b]y placing [the] personal effects inside the storage unit, [petitioner] manifested an expectation that the *contents* would be free from public view." Pet. App. 6. The court, however, found no objectively reasonable expectation that the padlock itself would be free from public view or minimal intrusion. *Id.* at 6 & n.2. Because no Fourth Amendment "search" of the padlock had been conducted, the court did not address the question whether the "plain view" doctrine would apply to the insertion of the key into the padlock. Pet. App. 6 n.2.

District Judge Woodlock, sitting by designation, dissented. Pet. App. 18-33.

ARGUMENT

The court of appeals correctly held that, under the specific circumstances of this case, the insertion of the key into petitioner's padlock did not implicate petitioner's reasonable expectations of privacy, and thus did not constitute a search within the meaning of the Fourth Amendment.

1. The question whether a search was conducted for Fourth Amendment purposes depends on whether petitioner "exhibited an actual (subjective) expectation of privacy" and whether "the expectation [is] one that society is prepared to recognize as 'reasonable.'" *Katz* v. *United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring); see, *e.g.*, *California* v. *Greenwood*, 486 U.S. 35, 39 (1988); *United States* v. *Jacobsen*, 466 U.S. 109, 113 (1984).

a. In this case, there is no basis to hold that petitioner exhibited even a subjective expectation of privacy in the interior of the padlock. Since it is the

interior of the padlock—and not the interior of the compartment—into which the FBI agents inserted the key, it is petitioner's expectations with respect to the interior of the padlock that govern the analysis. See *California* v. *Ciraolo*, 476 U.S. 207, 211-212 (1986); *Florida* v. *Riley*, 488 U.S. 445 (1989). Although he did testify that he "expect[ed] that that area would be [his] private area" (Pet. App. 5) and that he "wanted to secure what was inside of the bin" (*id.* at 6), he did not testify that he intended that the interior of the lock itself would be used to conceal items of a private nature, or that he wanted to secure what was inside the padlock. Therefore, although the courts below did not reach the issue, the record in this case would have provided an insufficient basis to conclude that the inspection of the padlock intruded upon any subjective expectation of privacy.

b. In any event, as the courts below correctly held, any expectation of privacy that petitioner might have had in the interior of a padlock securing a rented storage compartment in a publicly accessible area would not have been objectively reasonable. Two separate considerations support this conclusion.

First, petitioner should have expected that individuals might touch, handle, and even insert keys into his padlock for a number of reasons. For example, the holder of another compartment who momentarily forgot its number or misread the number on petitioner's compartment might reasonably be expected to place his key in petitioner's padlock before realizing his mistake. The mistaken insertion of a key into petitioner's padlock, like the intentional insertion of the key by the FBI agents in this case, would not implicate any privacy interest of petitioner because the erring compartment holder would not in-

trude upon petitioner's interest in maintaining the privacy of the items he stored in the compartment.

Second, while a padlock may be placed on a door to prevent the public from entering a building or on a suitcase to protect its private contents, the interior of the lock does not contain private or personal objects. In this respect, a lock is much more like the exterior of a package, see *United States* v. *Van Leeuwen*, 397 U.S. 249 (1970), or an industrial complex, see *Dow Chemical Co.* v. *United States*, 476 U.S. 227 (1986), than it is like the interior of a dwelling, see *Payton* v. *New York*, 445 U.S. 573, 589 (1980), or of a footlocker, see *United States* v. *Chadwick*, 433 U.S. 1, 11 (1977). Accordingly, petitioner offers no reason to accept the proposition that society is prepared to accept as legitimate an expectation of privacy in the interior of a padlock located in a publicly accessible area.[3] See *United States* v. *DeBardeleben*, 740 F.2d 440, 444-445 (6th Cir.), cert. denied, 469 U.S. 1028 (1984).

2. Contrary to petitioner's contention, the court of appeals' decision is fully consistent with *Arizona* v. *Hicks*, 480 U.S. 321 (1987). In *Hicks*, a stereo component located in the defendant's apartment was ma-

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[3] Even if petitioner had an objectively reasonable expectation that the interior of the lock would not be intruded upon in certain ways, *i.e.*, that no one would make an unauthorized copy of the interior of the lock in order to duplicate the key, that expectation would not extend to the minimal intrusion here—the insertion of a key to determine whether it fit the lock. As pointed out above, petitioner reasonably would expect that such insertions could be made. See *California* v. *Ciraolo*, 476 U.S. 207, 213-214 (1986). And the information provided by such an insertion is so limited that it would not in any event constitute a "search" within the meaning of the Fourth Amendment. See *United States* v. *Place*, 462 U.S. 696, 707 (1983).

nipulated physically by police so that they could view its serial number, which turned out to be incriminating. Because the stereo component was located in the defendant's dwelling, the unquestioned starting point of the Court's analysis was that the defendant possessed a reasonable expectation of privacy in the component, as in other objects in his apartment.

Petitioner's padlock, by contrast, was not located in petitioner's home, nor in any other place in which an expectation of privacy has been recognized. Instead, the lock was located on the outside of petitioner's compartment, in a publicly accessible rental storage facility. Because this case does not involve an intrusion by government officials into any area that was the subject of petitioner's reasonable expectation of privacy, the issues addressed in *Hicks* concerning the scope of the plain view doctrine and the legitimacy of an inspection justified by something less than probable cause are not raised by the facts of this case.[4]

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[4] Petitioner contends (Pet. 7-8) that the court of appeals disregarded the principle recognized in *Rakas* v. *Illinois*, 439 U.S. 128 (1978), that a person can have a legitimate expectation of privacy in premises owned or rented by another. Contrary to petitioner's assertion, the court of appeals' result did not depend in any way on the identity of the owner or lessee of the storage compartment or padlock. The court simply held that even the owner of the padlock, exposed in a publicly accessible place, would not have an expectation of privacy that the lock would remain free from the insertion of a key.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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